Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

No. 96-328

In The

Supreme Court of the United States

October Term, 1996

THE WILSON CORPORATION, *et al.*,

Petitioners,

v.

TOM UDALL,
Attorney General of New Mexico,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New Mexico, *ex rel.* Tom Udall, Attorney General ("State"), respectfully requests that this Court deny the petition for writ of certiorari submitted on behalf of The Wilson Corporation, Colomex Oil & Gas Co., Ross Oil Co., Robinson Oil Co., Berridge Distributing Co., Inc., Metzger Stores, Inc., Polk Oil Co., Dial Oil Co., Eagle Energy, Inc., Farmington Oil Co., Graves Oil & Butane Co., Inc., Honstein Oil Co., Indian Capital Distributing Co. and Latasa Oil Co. (collectively "Distributors") on 27 August 1996, seeking review of the Opinion of the Court of Appeals of the State of New Mexico reported at 916 P.2d 1344 (1996), *cert. denied*, 916 P.2d 844 (N.M. 1996), *rehearing denied*, on 5 June 1996 in an unreported order.

JURISDICTION

The New Mexico Court of Appeals decided state constitutional and state statutory issues, not federal questions. Distributors claim in their Petition that the question presented to this Court "arises from the Opinion of the New Mexico Court of Appeals dated March 19, 1996," wherein that court erroneously, Distributors say, held that "[i]f the Attorney General makes the necessary showing, the person challenging the CID bears the burden of establishing some impropriety in the CID, such as the *absence of a* proper purpose for the CID. . . . " (Emphasis by Distributors; Petition for Certiorari, at p. 4, quoting the Opinion of the Court of Appeals, ¶ 16; Appendix, at pp. 15-16). To the extent this is the Court of Appeals' holding

at all, it is an assignment of burden of proof and a decision about procedure – which comports in every respect with this Court's decision in *United States v. Powell*, 379 U.S. 48, 58 (1964) ("The burden of showing an abuse of the court's process is on the taxpayer").

Distributors state further that the Court of Appeals held that civil investigative demands ("CIDs") should not be quashed unless the Attorney General's only purposes were improper (Petition, at p. 4). This, however, was not the Court of Appeals' holding in the decision Distributors ask this Court to review. See the Court of Appeals' Opinion below, ¶ 2 (Appendix, at p. 4), noting that in an earlier related decision in *Brewer Oil Co. v. State of New Mexico*, 121 N.M. 106, ___, 908 P.2d 799, 801-803 (Ct. App. 1995), *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995) ("*Brewer Oil*"), it had reversed the district court's ruling that the Attorney General had an improper purpose in seeking the CIDs, "holding that (1) the CIDs could be quashed only if the *sole* purpose of the Attorney General was an improper one and (2) the undisputed facts before the district court did not compel the inference that the sole purpose of the Attorney General was improper" (emphasis in the original).

Thus the question presented to this Court was decided nearly a year ago in the Court of Appeals' decision in *Brewer Oil, supra*. Distributors could not have been surprised when the same court relied on its holding in *Brewer Oil* in determining that Distributors had failed to establish that the Attorney General had no proper purpose in seeking the CIDs and that the CIDs therefore should not be quashed on those grounds.

What the Court of Appeals did hold with respect to the question presented to this Court was squarely an evidentiary holding, based upon New Mexico state practice and precedent:[1]

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[1] Distributors ask the Court to review the Opinion and Order of the Eighth Judicial District Court of the State of New Mexico, not the final judgment or decree rendered by New Mexico's highest court in which a judgment could be had (Petition, at p. 1). This error reflects the jurisdictional flaw in Distributors' Petition, that is Distributors' failure to preserve any federal questions upon which New Mexico's highest court could render an opinion or judgment.

In the District Court, Distributors argued *inter alia* that the CIDs issued by the First Judicial District Court upon the Attorney General's application violated the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico State Constitution because the State had not made a "probable cause" showing. The District Court held that the CID provisions of the New Mexico Antitrust Act and the process followed by the State in obtaining the CIDs at issue here did not offend either the federal constitution or the state constitution. See the District Court's Decision and Order entered 26 April 1995, Conclusions of Law ¶¶ 18, 20, 21; Appendix to Petition at pp. 57-58.

Distributors could have appealed the District Court's Decision and Order on both federal and state constitutional grounds – but they did not. Their argument to the Court of Appeals was that the New Mexico state constitution provides greater protection to CID recipients than does the United States Constitution.

Thus, Distributors abandoned the federal constitutional issues decided by the trial court in the Court of Appeals. Distributors did not list any federal statutory or constitutional issues in their Docketing Statement to the Court of Appeals, nor did they brief any federal questions to the Court of Appeals. Distributors did not list the United States Constitution in the Table of Authorities in either their Brief in Chief or their Reply

> Without detailing the evidence at the hearing, we hold that the evidence presented by the Marketers was not so compelling that every rational person would necessarily have determined that the only purposes of the Attorney General were improper ones.

Opinion, ¶ 24; Appendix, at p. 20.

STATEMENT OF THE CASE

1. The Nature of the Case

The cases consolidated below are 11 of some 31 cases pending in various states of progress in district courts all over New Mexico – all virtually identical with respect to the legal and factual issues raised. Each involves a CID issued pursuant to Section 57-1-5 of the New Mexico Antitrust Act, NMSA 1978 (1995 Repl.) ("Antitrust Act"), to a company engaged in buying and selling gasoline in New Mexico. But for the vigor with which Distributors have resisted complying with the CIDs, there is nothing exceptional about this matter.

2. Proceedings Below

Stripped of argument, the proceedings below can be summarized in pertinent part as follows. In late May and early June, 1994, the Attorney General applied to the First

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Brief to the Court of Appeals, much less raise for the Court of Appeals' consideration any of the federal constitutional issues argued to the trial court. Accordingly, the Court of Appeals did not decide any federal questions.

Judicial District Court of New Mexico pursuant to the investigatory provisions of the Antitrust Act for CIDs against Distributors, among others. The CIDs were issued in the form sought. Each of Distributors declined to comply with the CIDs.

The State petitioned for orders requiring compliance with the CIDs by each of the Distributors involved in these consolidated cases and each of the Distributors petitioned for declaratory judgment seeking orders quashing the CIDs on numerous grounds, although their improper purpose claim was not among them. The State moved to dismiss the declaratory judgment actions on the grounds, among others, that Distributors had a full and adequate remedy in the enforcement actions filed by the State. The District Court dismissed the petitions for declaratory judgment on 15 March 1995.[2]

Each of Distributors also filed papers styled Motions for Summary Judgment, which included so-called "Statements of Material Facts as to Which No Genuine Issue Exists ('SMFs')." In support of the so-called Statements of

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[2] Distributors have included the District Court's Order dismissing their Petitions for Declaratory Judgment in the Appendix, to what end is not clear. Although they included the district court's dismissal of their Petitions for Declaratory Judgment as an issue in their Docketing Statement to the Court of Appeals, they did not mention the issue in their briefs. Under New Mexico Rules of Procedure, they thereby abandoned the issue for appellate purposes. *State v. Fish*, 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct. App. 1985), *cert. denied*, 102 N.M. 734, 700 P.2d 197 ("Other issues listed in the docketing statement but not briefed are deemed abandoned"). Neither issues raised exclusively in the Declaratory Judgment actions nor dismissal of those actions by the District Court are before this Court.

Material Facts relating to their improper purpose allegations, Distributors attached a lengthy report released by the Attorney General in May 1994 entitled *Gasoline Pricing and Marketing in New Mexico, an Interim Report ("Interim Report")* – the same report from which Distributors have selectively quoted to this Court (Petition, at pp. 11-12).

The *Interim Report* simply does not demonstrate lack of proper purpose as urged by Distributors. For example, the beginning of the paragraph from which Distributors quoted at the bottom of page 11 of their Petition states:

> Given these interim conclusions, our investigation is presently focusing on the questions raised above. We will be endeavoring first of all to determine whether there are violations of the antitrust laws, in the form of price fixing (overt or tacit), or in the form of anticompetitive price discrimination or other anticompetitive behavior. If we find violations of the presently existing antitrust laws, we have the ability to prosecute such violations. . . .

Interim Report, Introduction, at p. 3; Record Proper 1927 ("RP ___"). Adopting Distributors' view of the record would have required the District Court to accept as true a handful of statements contained in a hundred-page report, while rejecting as false the significantly greater balance of the report. Neither the trial court below, nor the Court of Appeals was willing to do this. See *infra*, at p. 15.

Contrary to Distributors' assertion that the State "failed to respond to the SMFs" (Petition, at p. 6), the State responded in oppostion to Distributors' Motions for

Summary Judgment. See, for example, the State's Response in Opposition to the Motion for Summary Judgment or in the Alternative to Quash Civil Investigative Demands of Berridge Distributing Company, Inc., Metzger Stores, Inc. and Polk Oil Company, filed in the District court on 20 September 1994 (RP 447-581).[3]

The District Court held a hearing on 16 November 1994 at which Distributors were permitted to be heard and to introduce evidence in support of their objections to the CIDs. Briefing continued in cases in other courts, which cases were consolidated by consent with the proceeding below in December 1994. In addition, the record was supplemented by both the State and Distributors following the November 1994 hearing. The State submitted Affidavits of the Attorney General and the State's economist, Professor Alfred Parker, and Distributors submitted an Affidavit from their economist, Dr. Allen Parkman. Distributors also submitted the entire hearing transcript from a subsequent proceeding in another New Mexico state district court involving different distributors but virtually identical issues and arguments.

On 23 February 1995, the District Court entered its Decision and Order requiring compliance with the CIDs. The District Court entered a second Decision and Order

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[3] The State responded generally that all but six of the allegations contained in Distributors' statement of allegedly undisputed material facts were either incorrect, immaterial or no more than conclusory assertions of opinion or law (RP 449, 453). The State then showed *seriatim* how each of the various allegations was either false, immaterial or conclusory opinion and not "material fact" (RP 449-458).

on 26 April 1995 following rehearing, revised as to form but not substance, enforcing the CIDs, from which Distributors appealed.

REASONS THE PETITION SHOULD BE DENIED

The question presented by Distributors for the Court's consideration garbles two separate issues. The first is reasonably clear: Does the New Mexico Court of Appeals' holding in an earlier related case that CIDs issued pursuant to Section 57-1-5 of the Antitrust Act, may be quashed only if the Attorney General's sole purpose in applying for them was an improper one conflict with the good faith requirements set out by this Court in *United States v. Powell,* 379 U.S. 48 (1964)? As discussed *infra,* the answer to this question is clearly no. The Court of Appeals' Opinion is entirely consistent with *United States v. Powell, supra,* and all of the cases succeeding it.

The second issue is significantly less clear but appears to be whether an unsupported allegation that the Attorney General applied for CIDs in aid of an investigation for antitrust violations is sufficient to demonstrate that he had a proper purpose in doing so. The problem with this second issue is that it misrepresents the factual record in the courts below. As discussed *infra,* the record below contains two Affidavits by the Attorney General stating that his purpose in instituting his investigation into gasoline marketing in New Mexico was to determine whether high gasoline prices are the product of antitrust violations. In effect, with respect to this second issue,

Distributors seek an impermissible advisory opinion from the Court.

Distributors' question thus is predicated on two assumptions, neither of which is correct.

1. Distributors misstate the law as set out in *United States v. Powell*

Distributors assert that the good faith requirements set out by the Court in *United States v. Powell, supra,* include "(1) the investigation has a legitimate purpose; (2) the inquiry is relevant to the purpose; (3) the information sought is not already in the [requesting party's] possession; and (4) the investigation is not being conducted for *an* improper purpose; and (5) the statutorily required administrative steps have been followed" (Petition, at p. 14; emphasis by Distributors). Distributors' fourth requirement – "the investigation is not being conducted for *an* improper purpose" – has been added to the list by Distributors.

The good faith requirements outlined by this Court in *Powell* were in fact four, not five:

> [The IRS Commissioner] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed.

379 U.S. at 58. *See also United States v. Stuart,* 489 U.S. 353, 359 (1989) (quoting *Powell*). Moreover, each of the United States Courts of Appeal cited by Distributors in support

of their argument formulated the good faith requirement set out in *Powell* as having four parts, not the five created by Distributors. *United States v. Lask*, 703 F.2d 293, 296 (8th Cir. 1983), *cert. denied*, 464 U.S. 829 ("These [*Powell*] standards are four: . . . "); *La Mura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985) (quoting four *Powell* standards); *United States v. MacKay*, 608 F.2d 830, 832 (10th Cir. 1979) (quoting four *Powell* standards). *See also United States v. Beacon Federal Savings & Loan*, 718 F.2d 49, 52 (2d Cir. 1983) ("Once the government makes a sufficient preliminary showing for enforcement, the burden shifts to the taxpayer to disprove one of the four *Powell* criteria . . . ").

2. The opinion of the New Mexico Court of Appeals is entirely consistent with other courts which expressly reached the issue raised by Distributors

In the Opinion below, the Court of Appeals noted its holding in its earlier decision in *Brewer Oil, supra*, 121 N.M. at ___, 908 P.2d at 801-803, that the CIDs could be quashed only if the Attorney General's sole purpose in obtaining them was an improper one, and held that the Distributors had not met their burden of demonstrating to the trial court that the Attorney General was motivated solely by improper purposes in seeking the CIDs. Court of Appeals' Opinion, ¶¶ 23, 24; Appendix at pp. 19-20.

In holding that the CIDs must be enforced so long as they were issued for a proper purpose, the Court of Appeals' decision was entirely consistent both with this Court's decisions in *United States v. Powell, supra, Donaldson v. United States*, 400 U.S. 517, 534-35 (1971), and

United States v. LaSalle National Bank, 437 U.S. 298, 316 (1978) ("those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service"), and with the lower courts which have squarely reached this issue. *See, e.g., McVane v. Federal Deposit Insurance Corp.*, 44 F.3d 1127 (2d Cir. 1995) ("Even if the Directors can show that one purpose underlying the subpoenas is improper, enforcement of the subpoenas is called for nonetheless so long as other, proper purposes exist"); *Environmental Protection Agency v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 447 (9th Cir. 1988) (administrative subpoenas should be enforced if the evidence sought is not plainly incompetent or irrelevant to any lawful purpose of the agency); *Federal Trade Commission v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980) ("even if an improper purpose by an agency or member of the staff is shown, enforcement of the subpoena is called for so long as proper purposes exist as well"); *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 909 (7th Cir. 1978), *cert. denied*, 439 U.S. 959 (" . . . the Comptroller General's investigation is motivated by at least one legitimate purpose and therefore is a proper investigation under principles of administrative law"); *Lynn v. Biderman*, 536 F.2d 820, 826 (9th Cir. 1976), *cert. denied*, 429 U.S. 920 ("It is not, however, a ground to deny enforcement of a subpoena that it is being employed for a wrongful purpose if there is also a legitimate purpose for the subpoena").

3. The question presented by Distributors misstates the factual record developed in the courts below

Distributors ask this Court to decide whether a CID may be enforced "on the mere allegation that a single proper purpose to use the CIDs is present, regardless of the presence of multiple improper purposes" (Petition, Question Presented). This question is based upon two false assumptions: (1) that the CIDs at issue were enforced without any demonstration of proper purpose and (2) that Distributors in fact proved "multiple improper purposes."

Conspicuously missing from Distributors' recitation of either the course of proceedings in the New Mexico courts or Distributors' Summary of the Facts Relevant to the Issues Presented for Review is so much as a passing reference to the Attorney General's Affidavits concerning his purpose in instituting this investigation. These Affidavits are in the record below, attached both to correspondence to the District Court and to the State's Response in Opposition to Latasa Oil Company's Motion for Summary Judgment filed on 30 December 1994 (RP 1315, 1648). It is the Attorney General's sworn statement that his "purpose in instituting this investigation was to determine whether high prices in this state are the product of conduct violating the antitrust laws" (Affidavit, ¶ 12; Appendix B, at 17a).

Thus neither the District Court, nor the Court of Appeals in affirming the District Court, based its determination that the CIDs were properly issued in aid of an antitrust investigation on a "mere allegation" of proper purpose. The findings concerning the State's purpose in

obtaining the CIDs were based *inter alia* upon the Affidavit testimony of the Attorney General.

Numerous courts have found such affidavit testimony sufficient to establish proper purpose in the absence of compelling evidence showing otherwise. *See, e.g., McVane v. Federal Deposit Insurance Corp.*, 44 F.3d 1127 (2d Cir. 1995), citing *United States v. Stuart*, 489 U.S. 353 (1989) ("An affidavit from a government official is sufficient to establish a *prima facie* showing that these requirements have been met"); *La Mura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985) ("the IRS can satisfy this burden [of demonstrating good faith] merely by presenting the sworn affidavit of the agent who issued the summons attesting to these facts"); *United States v. Davis*, 636 F.2d 1028, 1034 (5th Cir. 1981) ("this showing may be made by a simple affidavit").[4]

Distributors posit "the presence of multiple improper purposes." Distributors have been arguing vigorously for more than two years that the State is engaged in the challenged investigation for numerous improper purposes. In the District Court they alleged that the CIDs were sought in aid of the Attorney General's campaign for re-election; that they were sought with the purpose of advising the New Mexico State Legislature; and that the

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[4] Distributors took the position in the Court of Appeals that the Attorney General's Affidavits could not be considered because they were introduced after the 16 November 1994 hearing took place. As the Court of Appeals observed, this argument appears to be based on the mistaken view that the CID enforcement proceeding was in the nature of an evidentiary trial instead of the summary proceeding intended. Court of Appeals' Opinion, ¶¶ 17-23, Appendix, at pp. 16-19).

Office of the Attorney General was being used by a consultant to pursue his own personal agenda (26 April 1995 Decision and Order, Findings of Fact ¶ 14; Appendix, at p. 53).

The New Mexico courts were not persuaded by Distributors' "evidence" of such "multiple improper purposes." After a hearing, the District Court concluded that Distributors had not shown that the Attorney General was using the CIDs to aid in his re-election; that Distributors had not shown that the CIDs were obtained for the purpose of pursuing legislation aimed at curbing gas prices; and that Distributors introduced no credible evidence in support of their claim that the consultant had persuaded the Attorney General to use his office to advance his personal agenda (26 April 1995 Decision and Order, Conclusions of Law ¶¶ 12-16; Appendix, at pp. 56-57).

Indeed, the District Court determined that Distributors' "evidence" was insufficient to warrant permitting discovery against the State on those issues. The trial judge's determination with respect to the purpose for which the CIDs were sought is one of fact and should not be overturned unless it is clearly erroneous. *La Mura v. United States*, 765 F.2d 974, 981 n. 10 (11th Cir. 1985). In the face of the Attorney General's uncontroverted sworn affidavit concerning his purpose in instigating the investigation, the trial judge's determination that the Attorney General is engaged in an antitrust investigation is more than adequately supported by the record. Moreover, it has been established for many years that this Court does not sit to retry issues of fact heard and determined by the

properly constituted tribunals of the state having jurisdiction of the subject. *See, e.g., Lloyd A. Fry Roofing Co. v. Wood,* 344 U.S. 157, 161 (1952) ("There are no exceptional circumstances of any kind that would justify us in rejecting the [state] Supreme Court's findings; they are not without factual foundation, and we accept them"); *Portland Railway, Light and Power Co. v. Railroad Commission,* 229 U.S. 397, 412 (1913).

Moreover, in an earlier case involving identical allegations and virtually identical facts – reference to which is also conspicuously missing from Distributors' Petition – the Court of Appeals reversed a summary judgment against the State by the Fifth Judicial District Court of New Mexico on grounds that Distributors had shown an improper purpose, stating: "the statements in the Interim Report fall short of establishing beyond genuine dispute that there was any improper purpose for the CIDs, much less that the only purposes were improper." *Brewer Oil, supra,* 121 N.M. at ___, 908 P.2d at 802 (Slip Op., at p. 6; Appendix A, at 9a). In short, the New Mexico courts found a proper purpose based on the Attorney General's sworn statement and "mere" allegations of multiple improper purposes, not a "mere allegation" of proper purpose juxtaposed against proven "multiple improper purposes" as implied by Distributors.

Distributors have misstated the factual record in other ways as well. They claim there was evidence in the record "of retribution by the Attorney General against Petitioners who are his political adversaries" (Petition, at p. 15). This claim is flatly false – and in any event not properly before this Court. The district court made no findings relating to such an allegation; Distributors did

not except to the district court's silence with respect to such a claim; the Court of Appeals never addressed such an allegation.

Distributors asserted that the State admitted, through counsel, at a hearing in related cases before yet another New Mexico District Court that "no probable or reasonable cause existed to believe that a violation of the New Mexico Antitrust Act had occurred at the time he filed applications for CIDs" (Petition, at p. 12). This assertion is both irrelevant to the issue presented to this Court and false, as well, as the transcript of that hearing shows. What the State "admitted" was that counsel had not attempted to demonstrate any probable or reasonable cause to the court since the Antitrust Act does not require the Attorney General to make such a showing in support of his application for a CID (Tr. of 23 Nov. 1994 hearing in *Bar-F Enterprises, Inc. et al. v. State of New Mexico,* Dona Ana County Case No. CV-94-673, at 138; Exh. A to Distributors' Supplement to the Record filed in the District Court on 2 February 1995 (RP 2148).

Distributors claim that counsel for the State "passed" the opportunity to introduce evidence at the hearing in this matter (Petition, at p. 9, and again at p. 15). In quoting State's counsel's statement about "passing," Distributors take counsel's comment out of context and thereby misrepresent the record below. See transcript of 16 November 1994 hearing, at 11, 14-15.[5] Along this line,

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[5] What the State's counsel "passed" on – because the CIDs could speak for themselves in this regard – was describing for the court how each and every one of the CID requests described the documents sought with sufficient particularity to permit them to be identified.

Distributors also claim that the Attorney General never "proved" that CIDs existed and had been issued and served (Petition, at pp. 10-11). As the record below shows, and as the Court of Appeals found, Distributors admitted these facts in their Answers to the State's petitions to compel compliance. Neither New Mexico practice nor federal practice require a party to prove facts conceded by the opposing party in its pleadings (Court of Appeals' Opinion, ¶ 21; Appendix at p. 18).

CONCLUSION

For the reasons above, Distributors' petition for a writ of certiorari is entirely without merit and should be denied.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

BREWER OIL COMPANY, QUEEN OIL AND GAS COMPANY, BELL GAS, INC., A-DOC OIL COMPANY, AND KW FUELS, INC.,

Petitioners/Cross-Respondents-Appellees,

vs.

THE STATE OF NEW MEXICO by and through the ATTORNEY GENERAL for the State of New Mexico, THOMAS S. UDALL,

Respondent/Cross-Petitioner-Appellant.

No. 16,196

(Filed Nov. 9, 1995)

APPEAL FROM THE DISTRICT COURTS OF
EDDY, CHAVES, AND LEA COUNTIES
JAMES L. SHULER, District Judge

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OPINION

HARTZ, Judge.

1. The Attorney General appeals the district court's entry of a summary judgment quashing five civil investigative demands (CIDs). The only question to be resolved is whether the record before the district court established beyond genuine dispute that the Attorney General had no proper purpose for seeking the CIDs. Because we answer in the negative, we reverse and remand to the district court for further proceedings.

BACKGROUND

2. The New Mexico Antitrust Act, NMSA 1978, §§ 57-1-1 to -15 (Repl. Pamp. 1995), authorizes the Attorney General to apply to the Santa Fe County district court for approval of CIDs that require the recipients to submit to examination under oath or to produce items for inspection and copying. To obtain a CID directed to a particular person, the Attorney General must have "reasonable cause to believe that [the] person has information or may be in possession, custody or control of any document or

other tangible object relevant to a civil investigation for violation of [the Antitrust Act]." Section 57-1-5(A). Prior to the filing of an action for violation of the Act, the Attorney General must keep the testimony or material confidential "unless [1] confidentiality is waived by [a] the person being investigated and [b] the person who has testified, answered interrogatories or produced material, or [2] disclosure is authorized by the court." Section 57-1-5(C).

3. In May and June 1994 the Santa Fe County district court issued CIDs to the five gasoline marketers (collectively referred to as the Marketers) who are the petitioners in this case. The Attorney General's applications for the CIDs stated that each of the Marketers possessed information relevant to a civil investigation under the Antitrust Act and alleged that gasoline price and market data suggested that segments of the gasoline industry may be violating the Act. In August and September 1994 the Marketers filed petitions for declaratory judgment in the Fifth Judicial District seeking a determination that the CIDs were unlawful and should be quashed. The Attorney General cross-petitioned for orders requiring the Marketers to comply with the CIDs. The five suits were consolidated in Eddy County district court.

4. On November 17, 1994 the district court conducted a hearing on the Marketers' motions for summary judgment. Two weeks later the district court entered an order granting the motions, stating that the order was "based upon the uncontested proof that the [Attorney General] has conducted an investigation under [the Antitrust Act]

for an improper purpose and intends to use the information elicited in the investigation for impermissible purposes."

DISCUSSION

5. First, to avoid confusion we note that the ground for quashing the CIDs was not the lack of evidence of a violation of the Antitrust Act. Under Section 57-1-5 it is necessary only that the Attorney General be conducting a civil investigation to determine whether the Antitrust Act has been violated and that there be reasonable cause to believe that the recipient of the CID has information or materials relevant to the investigation. *See Material Handling Inst. v. McLaren*, 426 F.2d 90 (3d Cir.) (CID obtained by justice department), *cert. denied*, 400 U.S. 826 (1970); *F.T.C. v. Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992) (CID obtained by FIC), *cert. denied*, 113 S. Ct. 1255 (1993); *cf.* NMSA 1978, § 57-1-15 (Repl. Pamp. 1995) (New Mexico Antitrust Act "shall be construed in harmony with judicial interpretations of the federal antitrust laws"). This statutory standard appears to be essentially the same standard that generally applies to investigative subpoenas. *See In re Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n*, 91 N.M. 516, 517, 577 P.2d 414, 415 (1978) ("[T]he inquiry must be within the authority of the agency[,] the demand must not be too indefinite[,] and the information must be reasonably relevant to the purpose of the investigation.").

6. Instead, the basis for the quashing of the CIDs was the impropriety of the Attorney General's purpose. We agree that if the Attorney General obtains a CID without

having the purpose of pursuing a civil investigation for possible violations of the Antitrust Act, then the CID is improper and should be quashed. *See Chattanooga Pharmaceutical Ass'n v. United States Dep't of Justice*, 358 F.2d 864 (6th Cir. 1966). Quashing the CID is permissible, however, only if improper purposes are the exclusive purposes of the Attorney General. If the Attorney General also has a proper purpose, the CID is lawful. *See Donaldson v. United States*, 400 U.S. 517, 532-36 (1971); *In re McVane*, 44 F.3d 1127, 1139 (2d Cir. 1995); *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 909-10 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978); *Lynn v. Biderman*, 536 F.2d 820, 826 (9th Cir.), *cert. denied*, 429 U.S. 920 (1976); *F.T.C. v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980). Of course, protective orders are appropriate to prevent use for an improper purpose of information obtained by a CID. *See Lynn*, 536 F.2d at 826-27.

7. In the present case the Attorney General's purpose in seeking the CIDs was determined on summary judgment. The procedural setting for the determination is critical to our resolution of the appeal. Summary judgment is granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." SCRA 1986, 1-056(C) (Repl. 1992); *see Richardson v. Glass*, 114 N.M. 119, 122, 835 P.2d 835, 838 (1992). The moving party must submit a memorandum which sets out "a concise statement of all of the material facts as to which the moving party contends no genuine issue exists." SCRA 1-056(C). Each fact must "refer with particularity to those portions of the record upon which the moving party relies." *Id.* If the opposing party does not specifically controvert a fact set forth in

the moving party's memorandum, the fact "shall be deemed admitted." *Id.; see Richardson,* 114 N.M. at 122, 835 P.2d at 838.

8. The Marketers' briefs in support of their motions for summary judgment recited 29 facts (Facts) about which they claimed there was no genuine issue. They attached affidavits and other documents upon which they relied as support for their Facts. The supporting document relevant to the issues on this appeal is their Exhibit 1, a report by the Attorney General entitled "Gasoline Pricing and Marketing in New Mexico/An Interim Report/May 1994." The Marketers incorporated the Interim Report by reference into their memoranda in support of their motions for summary judgment.

9. On appeal the Marketers contend that "[t]he uncontested facts demonstrate that the Attorney General was attempting to influence the free-market economy by collecting information under the guise of CIDs, which would eventually be used to formulate legislation designed to fix and lower the price of gasoline." They rely on their Facts 26 through 29, which state:

> (26)
>
> The Attorney General's opinion is that "persistently oligopolistic markets with high barriers to entry may be of concern even where there is no identifiable illegal conduct occurring and it may be desirable for the state to intervene in such markets and attempt through regulation or other means to encourage greater competition." *See,* Exhibit 1, page 77.

(27)

Further, "[t]he Attorney General's staff will carefully review legislation enacted in other states intended to foster increased competition in gasoline markets and decrease retail gasoline prices and consider legislative solutions to the problem." *See,* Exhibit 1, page 78.

(28)

The Attorney General is attempting to influence the free-market economy of New Mexico by obtaining confidential financial information under the guise of a CID. *See,* Exhibit 1, page 78.

(29)

The Attorney General has stated that:

> We must remember that consumers and members of the gasoline industry are all citizens entitled to the protection of the laws. If there are provable antitrust violations being committed, we are committed to putting a stop to them. But if there are no such violations, and the question becomes one of deciding as a community what action should be taken to deal with high prices in a particularly vital industry, that will be a question this office cannot answer by itself. We do hope that our intensive study of this industry's pricing behavior will, when it is completed, supply the kind of detailed and sophisticated information which will be needed to deal with these issues.

See, Exhibit 1, pages 3 and 4 of the Introduction.

10. In response to the Marketers' motions for summary judgment, the Attorney General did not specifically controvert any of these four recited Facts. Rather than submitting a prehearing affidavit asserting a proper purpose for the CIDs (which would have precluded the summary Judgment and avoided the resulting delay), the Attorney General responded simply that "[Facts] numbered 11 through 27 contain allegations, some of which may be true and others of which are false, none of which are material to issues before this Court."

11. Perhaps Facts 26 through 29 read in isolation would establish that the Attorney General's sole purpose in seeking the CIDs was an improper one. But because those Facts rely upon the Interim Report as authority and because the Interim Report is incorporated into the Marketers' memoranda in support of their motions for summary judgment, we must examine the Interim Report as a whole to determine whether the only reasonable conclusion that one can draw from it is that the CIDs were sought for an improper purpose. Our review of the Interim Report reveals that it does not necessarily establish an improper purpose for the CIDs.

12. To be sure, the Interim Report recognizes the possibility that there have been no antitrust violations with respect to the marketing of gasoline, and it suggests that the Attorney General may seek legislation to regulate the market. The Interim Report also states that information acquired by the Attorney General may be used to support such a legislative effort. The marketers infer that the Attorney General is not interested in pursuing violations of the Antitrust Act but is simply seeking information to

support his legislative agenda. Nevertheless, the statements in the Interim Report fall short of establishing beyond genuine dispute that there was any improper purpose for the CIDs, much less that the only purposes were improper.

13. There are two reasons why the inference drawn by the Marketers is not compelled by the Interim Report. First, the Interim Report makes no mention of CIDs. It indicates that the Attorney General had been collecting data by other means for some time. The Marketers do not suggest that it would be unlawful for the Attorney General to use that data to support a legislative agenda. Although one might conclude that the Attorney General would also use any information obtained by CIDs to support a legislative agenda, one could equally presume that the state's highest law-enforcement official would not use information obtained by CIDs for a purpose contrary to law. In other words, a reasonable person reading the Interim Report would not necessarily conclude that the information to be used by the Attorney General for his legislative agenda would include data acquired through CIDs. When it is reasonable to draw two (or more) contrary inferences from undisputed facts, the choice of inference cannot be made on summary judgment. *See National Excess Ins. Co. v. Bingham*, 106 N.M. 325, 328, 742 P.2d 537, 540 (Ct. App. 1987).

14. Second, the Interim Report's concession that there may be no Antitrust Act violations in the New Mexico gasoline market does not compel the inference that the Attorney General is not pursuing a legitimate civil investigation to determine whether such violations exist. As noted above, it is appropriate for the Attorney General to

seek a CID despite the absence of any certainty that a violation of the Antitrust Act has occurred or is occurring. The introduction to the Interim Report states: "We will be endeavoring first of all to determine whether there are violations of the antitrust laws." If the statement is true, one can infer a proper purpose for the CIDs. The statement may be false, but its falsity cannot be decided on a motion for summary judgment.

15. We have also reviewed the transcript of the hearing on the motions for summary judgment. We find no concession by the Assistant Attorney General attending the hearing that the CIDs had no proper purpose.

16. In short, we hold that the present record cannot sustain a summary judgment quashing the CIDs on the ground that the Attorney General's purpose in seeking the CIDs was improper. The Marketers are, of course, not foreclosed from seeking a determination on this issue on the merits, after a full evidentiary hearing, nor are they foreclosed from pursuing other grounds for quashing the CIDs. In addition, they may seek protective orders to maintain the confidentiality of information obtained by the CIDs. We need not decide at this juncture the circumstances under which disclosure may be authorized by a court pursuant to Section 57-1-5(C). The statute itself fails to provide any substantive guidelines governing disclosure. Until there has been a judicial determination regarding when disclosure is authorized, it would be advisable for the Attorney General to segregate any material acquired through CIDs from information otherwise acquired.

17. For the above reasons, we reverse the summary judgment issued by the district court and remand for further proceedings consistent with this opinion.

18. **IT IS SO ORDERED.**

/s/ Harris L. Hartz
HARRIS L. HARTZ, Judge

WE CONCUR:

/s/ Benny E. Flores
BENNY E. FLORES, Judge

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

APPENDIX B

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

TOM UDALL, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, Respondent. BERRIDGE DISTRIBUTING CO., INC., *et al.*, Intervenors and Cross-Petitioners,	(Filed Dec. 30, 1994) Civil Action No. 94-66(SQ) No. 94-64 CV 94-72 CV 94-186 CV 94-187 CV
LATASA OIL COMPANY, INC., Petitioner, v. STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Respondent. and STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Cross-Petitioner,	Civil Action No. CV 94-84 Consolidated With No. 94-66(SQ)

v.)
LATASA OIL COMPANY, INC.,)
)
Cross-Respondent.)

RESPONSE OF THE STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL IN OPPOSITION TO LATASA OIL COMPANY'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO QUASH A CIVIL INVESTIGATIVE DEMAND

EXHIBIT E

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

TOM UDALL, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, Respondent. BERRIDGE DISTRIBUTING CO., INC., *et al.*, Intervenors and Cross-Petitioners,	Civil Action No. 94-66(SQ) No. 94-64 CV 94-72 CV 94-186 CV 94-187 CV Consolidated with No. 94-66(SQ)
LATASA OIL COMPANY, INC., Petitioner, v. STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Respondent. and STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Cross-Petitioner,	Civil Action No. CV 94-84 Consolidated With No. 94-66(SQ)

v.)
LATASA OIL COMPANY, INC.,)
Cross-Respondent.)

AFFIDAVIT OF TOM UDALL

STATE OF NEW MEXICO)
) ss:
COUNTY OF SANTA FE)

I, TOM UDALL, being first duly sworn, depose and state as follows:

1. I have been the duly elected Attorney General for the State of New Mexico since January 1991.

2. I have personal knowledge concerning the circumstances surrounding the decision made by this office to institute an investigation for violations of Sections 57-1-1 and 57-1-2 of the New Mexico Antitrust Act, NMSA (1987 Repl.) in the gasoline industry in New Mexico and the development and progress of that investigation to date.

3. During April 1993, my office received numerous and increasing consumer complaints about relatively high gasoline prices in New Mexico. After my staff confirmed that (a) retail prices had in fact increased sharply during April and (b) that these price increases appeared to result in part from similar increases in wholesale prices at the rack, I authorized an investigation into pricing and marketing practices in the gasoline industry in New Mexico.

4. I believe that information acquired during the course of the investigation to date suggests: a) that many supply arrangements among marketers in the New Mexico market effectively impose exclusive dealing requirements on marketers which may unreasonably restrain trade; b) that refiners and/or distributors may be allocating customers and territory; c) that suppliers may be engaging in predatory, discriminatory pricing and refusals to deal; and d) that price-fixing in certain markets may be occurring.

5. I believe that the potentially illegal conduct described above together with demonstrably high prices in this state suggest that certain gasoline marketers may be violating the New Mexico Antitrust Act.

6. I believe that Latasa Oil Company, Inc. ("Latasa Oil") and other New Mexico marketers may possess and control information relevant to the investigation for violations of the New Mexico Antitrust Act which I requested and authorized in May 1993.

8. I authorized my staff to apply for civil investigative demands ("CID") to Latasa Oil in aid of our investigation for violations of the Antitrust Act.

9. This investigation was not prompted in any way by requests from legislators, individually or otherwise, to investigate the gasoline industry.

10. The CIDs at issue were not sought for the purpose of obtaining information for the New Mexico Legislature. Nor, indeed, could we seek information under a CID for this purpose since Section 57-1-5(C) of the New

Mexico Antitrust Act requires that all information provided to this office in response to a CID be kept confidential.

11. The statement contained in the Introduction to the May 1994 report entitled *Gasoline Pricing and Marketing in New Mexico, An Interim Report* to the effect that "our intensive study of this industry's pricing behavior will- . . . supply the kind of detailed and sophisticated information which will be needed to deal with these issues [lack of price competition in gasoline markets]" does not mean that I or anybody in this office intends to give the Legislature or any members thereof documents or information protected by Section 57-1-5(C) of the Act.

12. My purpose in instituting this investigation was to determine whether high prices in this state are the product of conduct violating the antitrust laws.

13. Because I am also called upon to advise the New Mexico Legislature concerning proposed legislation and the Legislature has made clear that competition in gasoline markets is a matter of continuing concern, I have directed my staff to review and analyze legislation enacted in other states directed to increasing competition in gasoline markets. However, my purpose in authorizing the contested CIDs was and continues to be determining whether the antitrust laws are being violated by those marketing gasoline in New Mexico.

14. Because we are a public agency answerable to the public, all major decisions in this office are made with due consideration to public interest, public perception

and public opinion, but no decision is made on an investigation of this magnitude based solely or even principally upon those considerations. My decision to authorize this investigation was based on my professional judgment and my continuing belief that antitrust violations may be occurring.

15. I deny that this investigation was initiated or is being pursued for political gain.

16. This affidavit is submitted for the limited purpose of responding to certain allegations raised by Latasa Oil in its Motion for Summary Judgment.

/s/ Tom Udall
Tom Udall

Subscribed and sworn to before me
this 28th day of December, 1994.

/s/ Margie D. Sandoval
Notary Public

My Commission expires:

Feb. 23, 1995